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February 16, 1993

Ms. Donna Searcy
Federal Communications Commission
1919 M Street, N. W.
Washington, DC 20554

Dear Ms. Searcy:

Enclosed please find the original and nine copies of the reply comments of Consumer Satellite Systems, Inc., d/b/a National Programming Service in the matter of Docket No. 92-265.

Very truly yours,

Mark C. Ellison

MCE/dmw

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	
and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

REPLY COMMENTS OF CONSUMER SATELLITE SYSTEMS, INC. d/b/a NATIONAL PROGRAMMING SERVICE

Consumer Satellite Systems, Inc. d/b/a National Programming Service (hereinafter "NPS"), by its attorney, hereby submits its reply comments in the above captioned Notice of Proposed Rule Making (the "NPRM").

I. INTRODUCTION

The Commission has received many well researched and articulate comments from parties that are potentially affected by Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") and the regulations to be promulgated in this proceeding. Unfortunately, many of the comments are clearly aimed at establishing extraordinarily high barriers to relief under Section 628 by aggrieved multichannel video programming distributors ("MVPDs"). Of great concern to NPS is the fact that the NPRM reflects a predisposition on the part of the Commission to embrace such an approach. The Commission is urged to recognize that Congress did not pass the Act only to have the Commission establish insurmountable burdens for the correction of discriminatory practices.

It is only natural that The National Cable Television Association and vertically integrated cable program suppliers would have the Commission limit the applicability of the Act to the greatest extent possible through the imposition of regulations which present a vast array of evidentiary and procedural hurdles for complainants under the Act. Congress did not, however, intend to have the Commission redesign the Act in a manner which constricts its original purpose and intent. To a large degree, the comments filed in this NPRM ignore the Congressional purpose and intent and simply overlook the fact that Section 628 of the Act has, at its core, the purpose of remedying, in broad fashion, situations where there has been discrimination in price, terms or conditions in the sale of satellite cable programming.

In its initial comments, NPS chose to provide the Commission with information reflecting the degree of discrimination it has encountered in gaining access to programming. The presentation of anecdotal information was intentional and purposeful. NPS sought to provide the Commission with a "reality check" on all of the technical legal arguments which were anticipated in this proceeding. NPS, as a relatively small independent player in the programming distribution business, looks upon the Act as a long awaited cure for the unfair and discriminatory treatment it has received over the years in its dealings with programers. However, if the Commission construes and applies the Act in the narrow and constrictive fashion implied in the NPRM and argued for in many of the "pro-cable" comments filed, Congress might just as well have never passed Section 628 in the Act. Despite the fact that NPS has operated with outrageous price and term discrimination in program access, it appears entirely possible that the Commission could promulgate rules which completely subvert its ability to redress its grievances under the Act.

II. THE ELEMENT OF HARM AND THE PRIMA FACIE CASE

In the NPRM, the Commission, at paragraph 10, states:

> The plain language of Section 628 (b) suggests that our regulations should implicate practices that are both (i) "unfair", "deceptive", or "discriminatory", and (ii) could significantly hinder multichannel video programming distributors from providing satellite programming to consumers.

The Commission then asks for comments on the threshold showing of "harm" required to support a complaint. In response, several comments have urged that the rules permit unfair or discriminatory conduct in the absence of any showing that the MVPD was actually prevented from distributing the programming. [1] NPS would submit that those comments - and, perhaps, the Commission in asking the question - have misconstrued the Act. There is no requirement that an aggrieved MVPD show harm in the form of actual deprivation of programming access rights. Congress clearly recognized that although non-cable MVPDs may actually have distribution rights, those rights have frequently been granted on unfair and discriminatory terms. The record is replete with remarks regarding the significant price differentials between cable and non-cable technologies and Congress did not intend to limit actions solely to situations where there has been an actual denial of access. In fact, a case may be made for relief under Section 628 (b) even in the absence of any actual harm whatsoever. That Section prohibits conduct the "purpose or effect" of which is to hinder significantly or prevent any MVPD from providing the programming. If the conduct is designed or intended to hinder or prevent access, it is proscribed and actionable regardless of the actual result.

When an MVPD has established that it is paying rates or is subject to terms or conditions which are discriminatory, a *prima facie* case has been made. If the purpose or effect of that discriminatory practice is to significantly hinder or prevent the MVPD from providing the programming, the case is made under Section 628 (b). Even absent such showing of "harm", if the programmer cannot establish justifications for its actions under Section 628 (c), a case is made under that subsection.

A number of the programmer comments suggest reasons to justify to the price differentials between cable and alternative technologies. Whether or not those justifications can support the actual price differentials is not an appropriate topic for debate in this proceeding, although NPS is ready and able to debate and refute those purported justifications. What is important is the need for the Commission to adopt regulations which will permit NPS and

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[1] See for example, Comments of The National Cable Television Association ("NCTA") at pp. 7 - 8, and Comments of Turner Broadcasting System, Inc. ("TBS") at pp. 18 - 19.

other competing MVPDs to engage in such a debate in the Section 628 complaint process. With respect to the home satellite dish market, NPS can show that programmers' costs for such activities as anti-piracy efforts, back office operations, and consumer marketing do not justify the significant price differentials between HSD and cable MVPDs. However, there will be no opportunity for aggrieved MVPDs to address these issues if the Commission establishes rules which (i) limit the number of programmers subject to Section 628 through excessive requirements for attributable interest, (ii) require an MVPD to show that there has been an actual deprivation of access, (iii) unduly limit the geographical reach of Section 628, or (IV) apply Section 628 only to new contracts.

III. ATTRIBUTABLE INTEREST.

It has been suggested in the Comments of the NCTA that the minimum level of attributable ownership of a programmer by a cable operator to trigger application of Section 628 should be at least 50%. Viacom International, Inc. ("Viacom") suggests that only programmers which have vertical ownership by cable operators representing at least 5% of the programmer's cable distribution should be subject to the Section.[2] If indeed Congress intended the Section to have such limited application, a considerable amount of time and effort has been wasted. Under such an interpretation very few programmers would be subject to the Act. It is inconceivable that such was the intent of Congress in passing the Act.

In its initial comments, NPS suggested that for "attributable interest" a threshold of 5% cable ownership would probably be adequate. NPS will stand by that position. However, it may be argued that Congress intended to have any level of ownership interest, no matter how small, be sufficient to trigger the Section if that ownership interest could be "attributed" to a cable operator. Congress did not say "controlling interest", "significant interest", "substantial interest" or any similar term. It said merely "attributable interest" to provide for an extremely broad application of the Section to fulfill the Congressional intent. Furthermore, as noted in the initial comments of NPS, the primary

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[2] Viacom's affiliated cable system represents well under 5% of the cable market, and, presumably, less than 5% of the distribution of Viacom's programming services. Hence, SHOWTIME, The Movie Channel, MTV, VH-1, and Nickelodeon would all be exempt from requirements of Section 628.

factor in influencing a programmer is not necessarily attributable ownership by a cable operator. As stated in the Comments of the Coalition of Concerned Wireless Cable Operators (at p.2), "It is immaterial to those seeking access whether a cable operator has an "attributable interest" in a program supplier....The ability of a cable operator to influence a program supplier's decision to make its product available is primarily a function of size."

IV. GEOGRAPHICAL LIMITATIONS ON RIGHTS OF ACTION.

Where an MVPD has been subjected to discriminatory prices, terms, or conditions with respect to the programming offering of a vertically integrated programmer, the purpose or effect of which is to significantly hinder or prevent or prevent programming access, that MVPD must be permitted to bring an action under Section 628 with respect to any territory where the MVPD is conducting business and where those discriminatory rates, terms, or conditions have caused, or were intended to have caused, harm due to the fact that the MVPD is competing with another MVPD in that territory which enjoys unjustified, preferential terms.

The NPRM suggests that the prohibitions of Section 628 might apply only in local markets where the aggrieved MVPD is actually competing with a programmer's vertically integrated cable system.[3] One of the programmers endorsing such a geographical limitation was Viacom. As noted in footnote 2. above, Viacom operates the programming service "Nickelodeon". Information contained in the Commissions Report in MM Docket No. 89-600 indicates that the highest rate paid by a cable operator for that programming service was $0.25. In comparison, NPS is paying approximately seven (7) times that rate.[4] According to the comments of Viacom, its affiliated cable systems operate in six local markets. However, NPS is faced with a situation where, throughout the nation, it is facing unfair competition from cable systems which pay a fraction of NPS's cost for the service. Thus, the Commission and Viacom, as well as other programmers, are suggesting that even though NPS may meet all of the statutory criteria for an action under Section 628, it can seek relief

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[3] NPRM at para. 11.

[4] See Report, In the Matter of Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Service and the initial comments of NPS filed in the instant proceeding.

only with respect to six markets! Even then such relief would be available only if the Commission does not adopt Viacom's position on attributable ownership. Otherwise, NPS would probably not even have the opportunity to seek remedial action in those two markets with respect to Viacom's services. Such a result does not comport with the purpose of Section 628.

In the Joint Explanatory Statement of the Committee of Conference there is a clear indication that Congress intended the scope of relief to extend beyond a limited number of local markets. On page 74 of that Statement, the Committee states:

> In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable. (Emphasis added.)

It is difficult to envision how the Commission can carry out the directive to extend programming to areas not served by cable if the applicability of Section 628 is limited not only to areas served by cable, but, moreover, only to areas served by the programmers' vertically integrated cable systems. There is no support in the record of the Act or in the Act itself to support such a limitation. To the contrary, there is extensive evidence in the record as well as in the Commission's own studies indicating that there are incentives for a programmer to act in a discriminatory or anti-competitive manner in cabled areas (both those of their affiliated systems and those of non-affiliated distributors) and uncabled areas.

V. PROSPECTIVE APPLICATION OF THE ACT.

The NPRM reflects an assumption that Section 628 and the rules to be promulgated in this NPRM are to be applied prospectively only. Under that assumption, all existing contracts would be grandfathered. A number of parties filing comments also argue in favor of prospective application. [5] Once

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[5] See, for example, Comments of NCTA, TBS, and Viacom.

again, such an interpretation is contrary to Congressional intent and would neutralize the effect of Section 628. As noted in the Comments of the Wireless Cable Association, there is nothing in the record or in the Act to support an assumption of prospective application of Section 628, other than those exclusive contracts which Congress expressly grandfathered.[6] Clearly, Congress was well aware of its ability to grandfather all existing programming distribution agreements, but it did not do so.

If MVPD's which are currently operating under discriminatory contracts must wait until those contracts expire before they can achieve fairness and relative parity with competing MVPDs, the present inequitable situation will be exacerbated. New MVPD's will be able to enter the market, assert rights to nondiscriminatory rates under Section 628, and be placed in a position of significant competitive advantage. Similarly, cable affiliated home satellite dish packagers may be able to demand and receive rate adjustments, while independent packagers such as NPS are powerless to do likewise.

The Comments of the Wireless Cable Association suggest that the adoption of a policy which grandfathers existing discriminatory contracts is clearly contrary to the purpose of the Act and would unreasonably and unjustifiably delay the benefits to consumers and competition envisioned by Congress in passing Section 628. NPS concurs with this view. The Commission should establish rules which permit a reasonable period of time to transition from existing discriminatory rates to rates which meet the criteria of Section 628. Such regulations would not impose an unreasonable burden upon the programmers.

VI. EXCLUSIVE CONTRACTS

The NPRM suggests that all new programming services could be permitted to be distributed on an exclusive basis under a blanket exemption. Again, cable affiliated programmers have wholeheartedly embraced this suggestion. Such a blanket exemption must not be permitted. The NPRM does not cite - and indeed cannot cite - anything in the Act or record to

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[6] Similarly, in the retransmission consent section of the Act, Congress grandfathered some retransmitted satellite broadcast signals.47 U.S.C. Section 325 (b)(2)(B)

support such an exemption. While programmers' comments in this proceeding claim that such rights are essential to the launch of a new service, there is no real hard evidence given to demonstrate why such exclusivity is essential. Viacom, for example, states:

> Thus, by allowing limited cable exclusivity for new services, the Commission will enhance the diversity of programming. Viacom submits that a reasonable duration for exclusive cable contracts involving new program services is 10 years. This time frame will enable the new program service to establish itself while providing the cable operator with a legitimate expectation that its marketing expenses and inherent risk in carrying the new program service will be rewarded.[7]

There are several points which must be made in response to this assertion. First, why is it presumed that the exclusivity must be with a cable operator? If exclusivity is to be permitted, why not require that alternative technologies such as DBS or wireless cable have the opportunity to bid on the exclusive right? Second, juxtaposing the terms "limited cable exclusivity" and "10 years" seems rather ludicrous. The NPRM's suggestion, as unappealing as it may be to alternative technologies, reflects a 2 year exemption. Third, can the Commission simply assume that there are "marketing expenses" and "inherent risk" in carrying the new service? Perhaps not. In most cases the vast majority of marketing is done by the programmer - often cross promoting the new service on other cable channels and on the cable system's local ad avails (thus actually providing revenue to the cable operator which has "assumed the marketing risk"). Frequently, the cable operator is paid a marketing fee or allowance by the programmer. Further, the risk associated with giving a new service channel capacity will be greatly reduced when cable operators have the vastly expanded capacity which is anticipated in the coming months and years.

New service or not, the Commission must review each and every situation involving exclusivity and determine whether it is truly in the public interest. Does the exclusivity promote program diversity or does it simply promote the competitive advantage of one technology over another? In claiming that exclusivity is essential, has the programmer clearly demonstrated

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[7] Comments of Viacom at p. 37.

such need through factual evidence? The Commission cannot assume that exclusivity is a prerequisite for a new service, and if it does make that assumption, it cannot assume that such exclusivity must lie solely with cable distribution.

VI. CONCLUSION.

Since the advent of program scrambling in 1986 home satellite consumers and independent packagers of satellite programming have faced wide-spread and pernicious discrimination. In 1992, after many years of studies, hearings, and intense effort, Congress finally provided a chance for some, albeit limited, relief. NPS is deeply troubled by the tenor of the NPRM and the apparent willingness of the Commission to adopt regulations which could virtually eliminate the benefits conferred under Section 628. NPS urges the adoption of fair and reasonable rules which will permit the redress of programming access abuses in the manner and for the purpose which was intended by Congress.

Respectfully submitted,

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d/b/a National Programming Service

Dated: February 16, 1993

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